IN THE HIGH COURT OF BOMBAY AT GOA
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CRIMINAL MISCELLANEOUS APPLICATION NO. 222 OF 2003 WITH
CRIMINAL MISCELLANEOUS APPLICATION NO.223 OF 2003

Shri Premanand Krishna Anvekar,
major, goldsmith, r/o House
no.632, within Curchorem Police
Station, Madhegal, Kakoda, Goa. ...Petitioner/
Applicant.

Versus

Shri Gurudas Budho Velip,
major, House No.68,
Dhargani, within Village
Panchayat Bhati, Sanguem,
Goa. ...Respondent.

Smt. A. A. Agni, advocate for the petitioner/applicant.

Shri S. S. Kakodkar, advocate for the respondent.

CORAM : A. M. KHANWILKAR, J.

DATE : 20th November, 2003.

ORAL ORDER

Heard. This petition takes exception to the Order passed by the Additional Sessions Judge, Margao, dated August 14, 2003, rejecting the application made by the petitioner for permission to produce A.D. card in evidence and for considering the same at the time of passing the judgment. The only reason stated in the application as filed, can be discerned from paragraph 2 and part of paragraph 3, which read thus:-

> "2. Respondent states that he was not having the A.D. card with him but he later on succeeded in tracing the same from the Advocate from Panaji who had given the notice.....'
>
> 3. ..... The A.D. card could not produced earlier as the same was

> not traced when the matter was before the lower court."

This is the only explanation offered for invoking the discretionary power of the Appellate Court under Section 391 of the Code of Criminal Procedure. The Court below has rejected that application essentially by placing reliance on the dictum of the Apex Court in (2001) 4 SCC 759 in **Rambhau & Anr. vs. State of Maharashtra.**

2. The learned counsel for the petitioner contends that the court below has completely mis-directed it self in rejecting the application as filed, because the petitioner was essentially trying to cure formal defect in the proceedings by placing on record the subject A.D card. According to the learned counsel for the petitioner, the fact that the suit notice was served on the respondent is not in dispute and if that was so, production of the A.D. card would make no difference. In support of the above submission, reliance is placed on the decision in Rambhau's case (supra), as well as another decision of the Apex Court in 1987 S.C. 1321 **State of Gujarat vs. Mohanlal Jitamalji Porwal & Anr.** This submission clearly overlooks that the application was moved by the petitioner only after the respondent raised the plea in the appeal that the petitioner has failed to establish the factum of date of sending of notice as well as date of service of the said notice on the respondent. It is in that backdrop the said application was filed. The application was resisted by the respondent on

diverse grounds, inter alia that no cause was made out in the application for the inability of the petitioner to produce the A.D. card during the trial and specially when sufficient opportunity was available to the petitioner in that behalf. It is also rightly contended on behalf of the respondent that the facts stated in the application and more particularly as to what prevented the advocate to produce the same, are not even supported by the affidavit of the concerned advocate. Taking into account all those submissions, the Court below has rejected the application by relying on the decision of the Apex Court in Rambhau's case (supra). To my mind, there is no infirmity in the approach adopted by the Court below. The application as filed is vague as it does not state the basic dates on which the A.D. was traced and as to what prevented the petitioner or his advocate to produce the same during the course of the trial. Besides, no supporting affidavit of the concerned advocate is filed by the petitioner before the court below. Even otherwise, powers under Section 391 of the Code of Criminal Procedure are not to be invoked as a matter of course, but only when sufficient cause was to be made out by the petitioner for his inability to produce the said document on record during the trial.

3. In the case of Rambhau (supra) the Apex Court clearly observed that the order must not ordinarily be made if the prosecution had a fair opportunity and has not availed of it. The trial Court has rightly placed reliance on these

observations of the Apex Court in Rambhau's case (supra) as the same applies to the fact situation of the present case, inasmuch as it is not possible to suggest that the petitioner had no fair opportunity, whereas the petitioner did not avail of it. Insofar as the decision in the case of State of Gujarat vs. Mohanlal (supra) is concerned, the Apex Court allowed the production of additional evidence because it has found that the said evidence was only to cure the technical lacuna inasmuch as the opinion of the Mint Master had admittedly been placed on record. In the present case, however, if the petitioner was allowed to produce the subject document on record that would, in fact cause prejudice to the respondent-accused, who has raised specific objection regarding appropriateness of the conclusion reached by the trial Court in relation to the factum of the date of sending notice within the statutory time as well as receipt thereof. In that sense, it will not be a case of curing the technical lacuna, but a substantive defect in the evidence.

4. Hence, no case for interference is made out. Application rejected. It is however made clear that the Appellate Court should not be influenced by the observations made herein or by the lower Court while deciding the Appeal. The Appeal be decided on its own merit and in accordance with law.

In view of the above order the stay application is also dismissed.

A. M. KHANWILKAR, J.

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